SUPREME COURT, U. S.

OCT 29 1974

Supreme Court of the United States

October Term, 1974

No. 74-493

OHIO CIVIL RIGHTS COMMISSION,
Petitioner,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 3
Reasons for Granting the Writ 5

1. The Decision Below Is State Action Which Violates the Equal Protection Clause of the Fourteenth Amendment by Retreating from the State of Ohio's Past Commitment to Combatting Unlawful Discrimination and by Fostering Such Discrimination Through the Dilution of the Commission's Remedial Powers 5
2. The Decision Below Is State Action Which Violates the Due Process Clause of the Fourteenth Amendment by Foreclosing Relief to Victims of the Discriminatory Practices in Public Accommodations Prohibited by the Ohio Laws Against Discrimination 9
3. Victims of Racial Discrimination in Public Accommodations Have a Right to a Remedy That Includes Compensatory and Punitive Damages 11

Conclusion 12

Appendices:

A. Opinion, Judgment and Order of Supreme Court of Ohio Denying Rehearing 13
B. Opinion of Portage County Court of Appeals 22

C. Memorandum of Portage County Court of Common Pleas 28
D. Order of Ohio Civil Rights Commission 29

CITATIONS

Cases

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 5, 6
American Power Co. v. SEC, 329 U.S. 90 (1946) 12
Baker v. Carr, 369 U.S. 186 (1962) 9
Barrows v. Jackson, 346 U.S. 249 (1953) 8, 9
Bell v. Hood, 327 U.S. 678 (1946) 11
Bivins v. Six Unknown Named Agents, 403 U.S. 388 (1971) 11
Boddie v. Connecticut, 401 U.S. 371 (1971) 9, 10, 11
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 7
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 7
Civil Rights Cases, 109 U.S. 3 (1883) 7
Eisenstadt v. Baird, 405 U.S. 438 (1972) 9
Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973) 10
Evans v. Newton, 382 U.S. 296 (1966) 7
Gilliam v. City of Omaha, 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds*, 459 F.2d 63 (8th Cir. 1972) 11
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6
Griswold v. Connecticut, 381 U.S. 479 (1965) 9
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 6

Hunter v. Erickson, 393 U.S. 385 (1969) 7
Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) 11
Lee v. Southern Home Sites, Inc., 429 F.2d 290 (5th Cir. 1970) 7
Loving v. Virginia, 388 U.S. 1 (1967) 10
Marsh v. Alabama, 326 U.S. 501 (1946) 8
NLRB v. Strong, 393 U.S. 357 (1969) 11
Ortwein v. Schwab, 410 U.S. 656 (1973) 10
Reed v. Reed, 404 U.S. 71 (1971) 10
Reitman v. Mulkey, 387 U.S. 369 (1967) 7
Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973) 7
Shelley v. Kraemer, 334 U.S. 1 (1948) 8
Sherbert v. Verner, 374 U.S. 398 (1963) 10
Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *appeal docketed*, No. 74-1007-9 (6th Cir. 1974) 7
Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973) 7
Udall v. Tallman, 380 U.S. 1 (1965) 6
Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943) 11
Weiner v. Cuyahoga Community College District, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) 7
Williams v. Joyce, 4 Ore. App. 482, 479 P.2d 513, 40 A.L.R. 2d 1272 (1971) 11

Constitutional and Statutory Provisions

Constitution of the United States, Fourteenth Amendment 2, 5, 7, 9, 11
Administrative Procedure Act, 5 U.S.C. §551 8

28 U.S.C. §1257(3) 2
Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e .. 7
Title VIII Civil Rights Act 1968, 42 U.S.C. §3601 7
42 U.S.C. §3610 7
Ohio Revised Code §2901.35 9
Ohio Revised Code, Chapter 4112 8
Ohio Revised Code §4112.02(G) 4
Ohio Revised Code §4112.05(G) 2, 3, 6, 7, 9, 10, 11, 12
Ohio Revised Code §4112.06 8

Miscellaneous

29 C.F.R. §1601(h) 7
Comments, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 325 (1974) 6

Supreme Court of the United States

October Term, 1974

No. .....

OHIO CIVIL RIGHTS COMMISSION,
Petitioner,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner Ohio Civil Rights Commission respectfully prays that its petition for a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of Ohio entered in this case on June 12, 1974, and the petition for rehearing denied on July 31, 1974.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Ohio, reported at 38 Ohio St. 2d 217, 313 N.E.2d 3, appears in Appendix A to this petition. The Portage County Court of Appeals opinion, which is not reported, appears in Appendix B hereto. The Portage County Court of Common Pleas opinion, also not reported, appears in Appendix C. The decision of the Ohio Civil Rights Commission reported at 58 Ohio Op. 2d 503, appears in Appendix D.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 12, 1974. A timely petition for rehearing was denied on July 31, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether the Supreme Court of Ohio's construction of Section 4112.05(G) of the Ohio Revised Code to exclude awards of compensatory or punitive damages to victims of racial discrimination in public accommodations is state action which:

1. violates the equal protection clause of the Fourteenth Amendment by retreating from the State of Ohio's past commitment to combatting unlawful discrimination and by fostering such discrimination through the dilution of the Commission's remedial powers;

2. violates the due process clause of the Fourteenth Amendment by foreclosing relief to victims of the discriminatory practices in public accommodations prohibited by the Ohio Laws Against Discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment.

Section 1 * * * [N]or shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code, Title 41: §4112.05(G).

If upon all reliable, probative, and substantial evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law, and shall issue and, subject to the provisions of Chapter 119 of the Revised Code, cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08 of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. * * *

STATEMENT OF THE CASE

Linda Beeler, the white complainant before the Commission, was ordered to leave Kent Trailer Park immediately after a visit by a black friend (R. 78-80). From past conversations with the trailer park management, Ms. Beeler was aware that blacks might not be welcome at the park (R. 73-75). Because she felt that respondent had unlawfully discriminated against her due to her association with a black person, Ms. Beeler filed a sworn Charge Affidavit with the Commission (R. 80-82).

The Commission determined that respondent had violated the Ohio Laws Against Discrimination regulating

public accommodations: R.C. §4112.02(G). In its final order, the Commission awarded Ms. Beeler one hundred fifty dollars ($150.00) as compensation for depreciation to her trailer; five hundred dollars ($500.00) as compensation for physical and emotional distress and humiliation, and one thousand dollars ($1,000.00) as punitive damages for the intentional and malicious act of unlawful discrimination (R. 12-17; Appendix D). Since respondent had sold the trailer park, no cease and desist order was issued (Appendix D).

Those awards were well-supported by evidence adduced at public hearing (R. 40-43). The Beeler trailer had been purchased only *after* the park lot had been located (R. 68), and Ms. Beeler was unable to locate another lot upon her eviction (R. 171-72); therefore, the trailer had to be stored at her parents' house (R. 158-67), and Ms. Beeler lost the anticipated benefits of her trailer during her remaining two years as a student at Kent State University (R. 66). Respondent had known that Ms. Beeler intended to use the trailer for this period of time (R. 171-72).

Ms. Beeler had rented the trailer lot because her allergy condition forced her to live alone (R. 66). After the eviction, her inability to remain in the trailer resulted in aggravation of the condition (R. 170-71). The emotional impact of respondent's discriminatory treatment of Ms. Beeler was pronounced (R. 164).

Respondent acted in malicious, wanton and reckless disregard of Ms. Beeler's rights (R. 41; 87-89; 167). The Commission awarded punitive damages because such an assessment was required to accomplish the purposes of the Ohio Laws Against Discrimination and deemed necessary to deter others (R. 15; Appendix D).

The opinions of both the Court of Common Pleas and Court of Appeals for Portage County did not address the issue of the power of the Commission to award damages. The Supreme Court of Ohio first reached that issue in its opinion, and the federal questions presented by that Court's ruling were timely and properly raised at petitioner's earliest opportunity to do so in the Petition for Rehearing filed in the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS STATE ACTION WHICH VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY RETREATING FROM THE STATE OF OHIO'S PAST COMMITMENT TO COMBATTING UNLAWFUL DISCRIMINATION AND BY FOSTERING SUCH DISCRIMINATION THROUGH THE DILUTION OF THE COMMISSION'S REMEDIAL POWERS.

Once again, this Court is being asked to consider a case involving racial discrimination in public accommodations. In 1974, denial of public accommodations on the basis of race can only be characterized as reckless and wanton action.[1] This continuing disregard for basic civil rights is particularly reprehensible because little, if any, relief can be afforded the victim of such discrimination. The

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1. As Justice Brennan stated in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 233 (1970) (concurring in part and dissenting in part):

> However, in my view, a proprietor of a place of public accommodation who discriminates on the basis of race after * * * the enactment of the Civil Rights Act of 1964 * * * does so with reckless disregard as a matter of law, and therefore may be found liable for punitive damages.

proprietor may be prosecuted for such action, and a cease and desist order may issue, but the paucity of remedies, in terms of actual relief for the victim, accents damages as a form of relief.[2]

In this case. the only relief awarded the complainant was compensatory and punitive damages. The complainant, a white college student, leased a trailer park lot and was evicted because of a visit by a black person. Although the action of the trailer park operator was in clear and reckless violation of established state law and directly caused the student to suffer out of pocket expenses and physical and mental distress, no damages were allowed by the Supreme Court of Ohio.

At the administrative level, compensatory and punitive damages were awarded in this case. In order to accomplish the purposes of the Ohio Laws Against Discrimination, the Commission interpreted R.C. §4112.05(G) to provide for compensatory and punitive damages (Appendix D). Such an administrative interpretation merits substantial judicial deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

The decision below produced the anomalous result of a public accommodations remedial statute creating rights, but providing no remedy. The Ohio Laws Against Discrimination, as presently interpreted by the State's highest court, do not offer a remedy against unlawful discriminatory practices. As a result, the decision means that Ohio's

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2. It is probably most appropriate to award compensatory and punitive damages in a public accommodation case *viz-a-viz* other types of civil rights cases. *Adickes v. S. H. Kress & Co., supra; Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964). *Cf.*, Comments, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 325 (1974).

citizens will invariably resort to federal courts to obtain relief since compensatory and punitive damages may be awarded under several federal statutes.[3] Thus, the decision, in effect, nullifies the state forum.[4]

When viewed in this context, the decision below signals a retreat from the past commitment of the State to combatting unlawful discrimination. *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970). Such a retreat represents a violation of the Fourteenth Amendment to the United States Constitution by significantly involving the state in private discrimination. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-26 (1961); *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Hunter v. Erickson*, 393 U.S. 385, 387 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 373-81 (1967).

The Fourteenth Amendment to the United States Constitution proscribes state action which denies any person equal protection of the law. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). This Court has recognized that judicial ac-

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3. *See, e.g., Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *Lee v. Southern Home Sites, Inc.*, 429 F.2d 290, 293-95 (5th Cir. 1970); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 96 (3d Cir. 1973); *Steele v. Title Realty Co.*, 478 F.2d 380, 384-85 (10th Cir. 1973); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 124 (E.D. Mich. 1973), *appeal docketed*, No. 74-1007-9 (6th Cir. 1974).

4. Under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. §3601, and Title VII of the Civil Rights Act of 1964 (Fair Employment Act), 42 U.S.C. §2000e, the Commission is a deferral agency pursuant to the statutory scheme of deferring civil rights law enforcement to the states. In order to retain this status, Ohio's laws must provide substantially similar relief as federal law. 42 U.S.C. §3610(c); 42 U.S.C. §2000e-5(c) and (d); 29 C.F.R. §1601(h). The Commission presently has a $175,000 contract with the Equal Employment Opportunity Commission to process complaints as a deferral agency. The contract and deferral status of the Commission is jeopardized by the construction of R.C. §4112.05(G) in the court below.

tion is state action. *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). When the Supreme Court of Ohio ruled that damages could not be awarded in this case, the decision represented "state action" shielding private discriminators from any sanctions for their illegal conduct. A decision by the highest court of the state holding that damages cannot be awarded in a public accommodations case, when damages represent the only adequate remedy, reinforces private racial discrimination because there is no longer an effective deterrent against such discrimination. The State Supreme Court has ruled that Ohio law forbids racial discrimination in public accommodations, yet the Commission is powerless to award damages.[5] In the case at hand, the only relief afforded the victim was damages. This is particularly significant, when, under Ohio law, the only forum provided to citizens for remedying illegal discrimination in public accommodations is the Ohio Civil Rights Commission. Ohio Revised Code, Chapter 4112.

This court has held that state courts may not award damages *enforcing* an act of private discrimination. *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). In a like manner, a state court may not deny damages *shielding* an act of private discrimination. *Cf., Marsh v. Alabama*, 326 U.S. 501, 507 (1946).

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5. One reason given by the Ohio Supreme Court for not permitting damages was an unwillingness to imply a grant of power to an administrative agency. The Court stated in a footnote the following:

> Indeed, a question which we need not decide is whether by statute, such a power can be lodged in other than a judicial tribunal.

However, R.C. §4112.06 sets forth a procedure for judicial review of Commission orders in the state courts, thereby retaining in the judiciary the final power to award damages. Moreover, administrative agencies may be granted such power. *See*, Administrative Procedure Act, 5 U.S.C. §551.

Since the decision below construed R.C. §4112.05(G) in a way that retreats from the past commitment of the State of Ohio to eradicate unlawful discrimination, and the effect of that construction is to foster private discrimination by shielding the discriminators, the statute, as construed, violates the Fourteenth Amendment.

2. THE DECISION BELOW IS STATE ACTION WHICH VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY FORECLOSING RELIEF TO VICTIMS OF THE DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS PROHIBITED BY THE OHIO LAWS AGAINST DISCRIMINATION.

The only state forum available to a victim of unlawful public accommodations discrimination is the Commission.[6] By state statute, the Commission monopolizes relief from discrimination; therefore, the decision below prevents recourse by victims of unlawful discrimination to any state forum in which financial loss caused by such discrimination can be remedied.[7] The court's construction of R.C. §4112.05(G) precludes victims of discrimination from obtaining relief. This violates the due process clause of the Fourteenth Amendment to the United States Constitution.

The legal standards for due process were introduced in *Boddie v. Connecticut*, 401 U.S. 371 (1971). The statute at

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6. Effective January 1, 1974, R.C. §2901.35, which had prohibited public accommodations discrimination and provided for damages, was repealed.

7. The Commission has standing to raise the rights of putative victims of unlawful discrimination. *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953); *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972). Since the Commission's remedial power is restricted by the decision below, and the Commission is Ohio's civil rights law enforcement agency, standing to raise the constitutional arguments exists. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

issue in *Boddie* operated "to foreclose a particular party's opportunity to be heard." 401 U.S. at 380. In the instant case, the juxtaposition of the Commission monopoly over relief from unlawful discrimination and the court's refusal to construe R.C. §4112.05(G) as providing a meaningful opportunity for relief in the Commission produces the same unlawful result.

Under the *Boddie* doctrine, a violation of the due process clause is determined by a three part test: (1) the interests involved must be of a fundamental nature, (2) those interests must be significantly affected by the statute, as construed, and (3) alternative methods to obtain the relief sought must not be available. *Ortwein v. Schwab,* 410 U.S. 656 (1973).

Section 4112.05(G) of the Revised Code, as construed by the decision below, violates the due process standards established by *Boddie.* The right to be free from discrimination has been vigilantly guarded by this Court. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 8-11 (1967) (race); *Sherbert v. Verner,* 374 U.S. 398, 406-07 (1963) (religion); *Reed v. Reed,* 404 U.S. 71, 75-77 (1971) (sex); *Espinoza v. Farah Mfg. Co., Inc.,* 414 U.S. 86, 95 (1973) (national origin). This fundamental interest would be meaningless if those deprived of the right were without any remedy and those who denied persons their rights were left untouched. To foreclose access to a forum in which such relief can be granted is to significantly affect, perhaps undermine, this fundamental interest. Moreover, no alternative state forum is available in which financial loss caused by unlawful discrimination can be recompensed.

Whatever federal forum exists to provide a remedy for financial loss to victims of unlawful discrimination does not exculpate the failure of a state monopolized forum to provide such relief. Even if the state has no duty to pro-

vide a remedy for unlawful discrimination in the first instance, the provision of such a forum cannot constitutionally be flawed to the extent that victims of discrimination are denied an opportunity to be heard on their claimed right to receive compensation and punitive damages for the discrimination. *Cf., Boddie, supra,* 401 U.S. at 380.

Since the court below construed R.C. §4112.05(G) to deprive persons of fundamental rights without due process of law, the statute, as construed, violates the Fourteenth Amendment.

3. VICTIMS OF RACIAL DISCRIMINATION IN PUBLIC ACCOMMODATIONS HAVE A RIGHT TO A REMEDY THAT INCLUDES COMPENSATORY AND PUNITIVE DAMAGES.

Statutes *in pari materia* with R.C. §4112.05(G) have been held to include in their remedy compensatory and punitive damages. *Jackson v. Concord Co.,* 54 N.J. 113, 125-28, 253 A.2d 793, 800-01 (1969); *Williams v. Joyce,* 4 Ore. App. 482, 496, 479 P.2d 513, 527, 40 A.L.R. 2d 1272 (1971). Since federal constitutional rights are also being vindicated when state civil rights laws are enforced, damages may be a required remedy. *Gilliam v. City of Omaha,* 331 F. Supp. 4, 8 (D. Neb. 1971), *rev'd on other grounds,* 459 F.2d 63 (8th Cir. 1972). *Cf., Bell v. Hood,* 327 U.S. 678, 684 (1946); *Bivins v. Six Unknown Named Agents,* 403 U.S. 388, 395-97 (1971).

This Court has already recognized the role of damages in effectuating a remedial statute and enforcing public rights. *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 543 (1943); *NLRB v. Strong,* 393 U.S. 357, 359 (1969). The Commission viewed a damages award as essential in the instant case for no other relief could be granted (Appendix D).

If damages are not permitted to be awarded in this case, there is no remedy to racial discrimination in public accommodations. Such a result violates the Fourteenth Amendment, as argued in reasons 1 and 2, *supra*; therefore, a remedy that includes compensatory and punitive damages must exist, and the Supreme Court of Ohio should have so held.[8]

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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8. Since a reasonable interpretation of R.C. §4112.05(G) would have rendered the statute constitutional, the court had a duty to interpret the statute to include compensatory and punitive damages. *American Power Co. v. SEC*, 329 U.S. 90, 108 (1946).

APPENDIX A

Opinion of Supreme Court of Ohio

(June 12, 1974)

No. 73-811

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

OHIO CIVIL RIGHTS COMMISSION,
Appellant,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR
PORTAGE COUNTY

In September 1969, Linda Beeler rented space for a trailer at the Kent Trailer Park. Kent Trailer Park is part of a facility owned and operated by appellee, Ostep Lysyj, and which also engages in the business of selling trailers, cameras and camera equipment. The trailer park provided water, sewage and garbage disposal services on an individual basis to each guest and provided maintenance for the park. Guests lived at the trailer park, on both a long and a short-term basis, without formal rental agreements.

From September to December 12, 1969, Miss Beeler, who is white, had several white persons visit her at the trailer park. On December 12, 1969, however, Terry Hynde, a white, and Paul Bixby, a black, visited her there. Appellee, who had observed the visitors arrive, came to the

trailer shortly after their appearance and ordered Miss Beeler to leave the park by January 1, 1970. She complied with that order several days later and removed her trailer.

On February 27, 1970, Miss Beeler charged, by affidavit filed with appellant Ohio Civil Rights Commission, that appellee had unlawfully discriminated against her because of her association with a black person, in violation of R. C. 4112.02(G). Appellant, after investigating, finding probable cause and failing in conciliation efforts pursuant to R. C. 4112.05(B), issued a formal complaint upon appellee.

After a public hearing, appellant's hearing examiner submitted his written findings of fact, conclusions of law and recommendations. Thereafter, appellant issued its finding that appellee had evicted complainant "for reasons not applicable alike to all persons regardless of race, color, religion, national origin or ancestry," and that appellee had acted in wanton, wilful, malicious and reckless disregard of Miss Beeler's rights to use and enjoy the accommodations free from unlawful discrimination. Appellee was ordered to pay Miss Beeler $150 to compensate for the depreciation of her trailer, $500 to compensate for physical and emotional distress suffered by her, and $1,000 as punitive damages.

Pursuant to R. C. 4112.06, appellee petitioned the Court of Common Pleas for judicial review of the commission's order, and the court set aside the order as "not being supported by reliable, probative, and substantial evidence on the record." Upon appeal to the Court of Appeals, that judgment was affirmed. Although noting that there was "no question but that appellee had Linda Beeler removed from the trailer park for the reason that a black male visited her," the Court of Appeals held that she was not

discriminated against in a manner prohibited by R. C. 4112.02(G), and that a trailer park was not a place of public accommodation as defined in R. C. 4112.01(I).

The cause is now before this court pursuant to our allowance of a motion to certify the record.

Mr. William J. Brown, attorney general, *Mr. Andrew J. Ruzicho, Mr. Kenneth Montlack* and *Mr. Terence L. Blackburn,* for appellant.

Mr. James G. Ulrich, for appellee.

Per Curiam. Under R. C. 4112.02(G), it is an unlawful discriminatory practice "for any proprietor or his employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, national origin, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof."

> "Place of public accommodation" is defined in R. C. 4112.01(I), as including "any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, or other place for the sale of merchandise, or any other place of public accommodation or amusement where the accommodation, advantages, facilities, or privileges thereof are available to the public."

Appellee contends that he has not engaged in an unlawful discriminatory practice, within the meaning of R. C. 4112.02(G) and R. C. 4112.01(I) for the reasons that: (1) A trailer park is not a "place of public accommodation," as that phrase is defined in R. C. 4112.01(I); and (2) even if a trailer park is held to be a place of public accommodation within the purview of R. C. 4112.01(I), complainant below failed to show that appellee denied her the full enjoyment of such place because of her race or color.

Appellee, however, underestimates the force of those statutes and the public policy underlying their enactment. By the adoption of the "public accommodation" amendments to Chapter 4112, the General Assembly enunciated its purpose that illegal discrimination in places of public accommodation be totally and finally eradicated, to the end that full enjoyment of such places be available to all persons, regardless of race, color, religion, national origin or ancestry.

Prior to the adoption of R. C. 4112.02(G) and 4112.01(I), the only remedy available to those discriminated against in places of public accommodation was under R. C. 2901.35. That statute proved to be ineffective as a vehicle for eliminating such discrimination. As a criminal statute in derogation of the common law, R. C. 2901.35 was subject to rules of strict construction. See *Fletcher v. Coney Island* (1956), 165 Ohio St. 150, 134 N. E. 2d 371. Consequently, in particular circumstances, the statute was held inapplicable to establishments that might otherwise have been considered places of public accommodation. *E.g., Harvey v. Sissle* (1936), 53 Ohio App. 405, 5 N. E. 2d 410.

However, R. C. 4112.02(G) and 4112.01(I) are remedial statutes and are unbounded by the rules of strict construction that governed R. C. 2901.35. R. C. 1.11. When determining the scope of the "public accommodations" amendments to Chapter 4112, the commission, initially, and the courts, upon review, are to construe those statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation. R. C. 4112.08; R. C. 1.11.

In this regard, although trailer parks are not one of the establishments specifically enumerated in R. C. 4112.01

(I), they may nevertheless fall within the purview of that statute by virtue of the omnibus clause contained therein. In determining whether a trailer park is encompassed by that clause, the doctrine of *ejusdem generis* is applicable. However, like all rules of statutory construction, the doctrine is applicable only to the extent that it aids in ascertaining the true meaning of the statute.

The establishments specifically delineated in R. C. 4112.01(I) all display several features of distinguishing similarity that indicate the intended scope of the omnibus clause. Each place offers accommodations, advantages, facilities or privileges to a substantial public. Secondly, each place offers its accommodations to the public on a nonsocial, sporadic, impersonal and nongratuitous basis. See Van Alstyne, Civil Rights: A New Public Accommodations Law for Ohio, 22 Ohio St. L. J. 683.

The instant trailer park evidences these attributes as fully as an inn, a restaurant, an eating house, or any of the other establishments specifically set forth in R. C. 4112.01(I). A trailer park which offers its facilities and accommodations, including rental space for trailers and mobile homes, to the public on a nonsocial, sporadic, impersonal and nongratuitous basis is a place of "public accommodation" within the meaning of R. C. 4112.01(I).

In support of his contention that he has not unlawfully discriminated in a manner prohibited by R. C. 4112.02(G), appellee argues that the proscriptions of that statute extend only to direct discrimination on the basis of race or color, and that the statute has no application to indirect discrimination against a person on the basis of the race or color of his associates. However, acceptance of that position would result in an overly restrictive interpretation of R. C. 4112.02(G).

The protection afforded by R. C. 4112.02(G) cannot be held to extend only to persons of a single or minority race. When determining whether there has been unlawful discrimination under R. C. 4112.02(G), the test is simply whether the proprietor, keeper, manager or employee of a place of public accommodation has denied to *any* person the full enjoyment of such place for reasons not applicable alike to *all* persons, irrespective of race, color, religion, national origin or ancestry.

In the case at bar, the record establishes that appellee denied Miss Beeler the full enjoyment of the facilities of his trailer park because she was white and was entertaining someone who was black. A principal motivation for his action was Miss Beeler's race, and his conduct constituted unlawful discrimination within the meaning of R. C. 4112.02(G).

In its order finding appellee had engaged in an unlawful discriminatory practice, appellant directed appellee to pay compensatory and punitive damages. Appellant claims the power to award such damages on the basis of the "affirmative action" clause of R. C. 4112.05(G). In pertinent part, R. C. 4112.05(G) provides:

> "If * * * the commission determines that the respondent has engaged in * * * any unlawful discriminatory practice * * * the commission shall * * * cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of Sections 4112.01 to 4112.08, of the Revised Code, including, but not limited to, hiring, reinstatement or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. * * *"

The power to award damages to a person suffering loss as a result of the unlawful action of another has traditionally been limited to judicial proceedings. We are not willing to imply a grant of that power to an administrative agency.*

We find nothing in R. C. 4112.05(G) which indicates that the General Assembly attempted to authorize appellant to award either compensatory or punitive damages. The authority included in the statute to award "back pay" refers to a specific and limited type of remedy to be used in fair employment cases. It does not constitute a broad grant of power. The authority to take "affirmative action" may well include extensive powers to effectuate the purpose of the Civil Rights Acts, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act. See, *e.g.*, R. C. 4112.051(E). Appellant does not now have the power to award either compensatory or punitive damages.

The judgment of the Court of Appeals is reversed and the order of the Civil Rights Commission, except with regard to the payment of compensatory and punitive damages, is affirmed.

Judgment reversed.

O'NEILL, HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

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*Indeed, a question which we need not now decide is whether, by statute, such a power can be lodged in other than a judicial tribunal.

Judgment Entry of Supreme Court of Ohio

(June 12, 1974)

No. 73-811

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

OHIO CIVIL RIGHTS COMMISSION,
Appellant,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR
PORTAGE COUNTY

This cause, here on appeal from the Court of Appeals for Portage County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, the order of the Civil Rights Commission, except with regard to the payment of compensatory and punitive damages, is affirmed.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Portage County for entry.

Order of Ohio Supreme Court Denying Rehearing

(July 31, 1974)

No. 73-811

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

OHIO CIVIL RIGHTS COMMISSION
Appellant,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX B

Opinion of Portage County Court of Appeals

Case No. 507

IN THE COURT OF APPEALS
STATE OF OHIO, PORTAGE COUNTY
ELEVENTH DISTRICT

OSTEP (REX) LYSYJ,
Appellee,

vs.

OHIO CIVIL RIGHTS COMMISSION,
Appellant.

OPINION

JONES, *P. J.*

We are called upon to review an order of the Common Pleas Court of Portage County, Ohio, that set aside an order of the Ohio Civil Rights Commission. The facts that gave rise to this review are basically these:

On February 27, 1970, the complainant, Linda Beeler, a white person, filed a charge affidavit with the Ohio Civil Rights Commission, appellant herein alleging that Ostep (Rex) Lysyj, dba Kent Trailer Park, appellee herein, had unlawfully discriminated against her on December 12, 1969, in violation of Revised Code Section 4112.02(G), because of her association with a black person, by ordering her to remove her trailer from the Kent Trailer Park. After investigating, finding probable cause and failing in conciliation endeavors, pursuant to Revised Code Section

4112.05(B), the Commission issued, and on December 2, 1970, served upon Ostep Lysyj, respondent in the administrative proceedings below, its formal Complaint No. 215. Respondent filed his Answer March 29, 1971. The Commission issued its Amended Complaint on April 7, 1971.

A public hearing was held before an independent hearing examiner, Ovid Lewis, on April 8, 1971. At the hearing, the Commission's case, which included seven witnesses and various exhibits, was presented. Respondent did not present any testimony or exhibits.

After consideration of the testimony, documentary evidence, and oral and written argument, the Hearing Examiner submitted his written Findings of Fact, Conclusions of Law and Recommendations to the Commission on July 23, 1971. Respondent filed his written objections thereto on August 11, 1971.

Thereafter, on October 5, 1971, pursuant to Revised Code Section 4112.05(G), the Commission issued its Findings of Fact, Conclusions of Law and Order No. 215, finding that: (1) Respondent owned Kent Trailer Park on December 12, 1969; (2) That he evicted Linda Beeler on December 12, 1969, "for reasons not applicable alike to all persons regardless of race, color, religion, national origin, or ancestry"; (3) That he acted in wanton, willful, malicious and reckless disregard of complainant's rights to use and enjoy her accommodations free from unlawful discrimination; and (4) That as a result of said act, complainant was injured by the depreciation of her trailer in the amount of $150.00 and in suffering of humiliation and of physical and emotional distress. The Commission ordered respondent to pay Linda Beeler $150.00 to compensate for the depreciation of her trailer, $500.00 to compensate for said distress, and $1,000.00 as punitive damages.

Pursuant to Revised Code Section 4112.06, the respondent petitioned the Common Pleas Court of Portage County for judicial review of the Commission's Order No. 215 in Case No. 41580. On April 27, 1972, Commission and respondent presented oral argument in the Common Pleas Court and Commission presented a trial brief in support of its argument.

On September 13, 1972, the Common Pleas Court entered judgment for respondent, holding that "The order of the Civil Rights Commission made and entered on the 5th of October, 1971, is set aside, the same not being supported by reliable, probative and substantial evidence on the record".

Appellant Commission, pursuant to Revised Code Section 4112.061 has perfected this appeal from that judgment.

The following two errors are assigned:

1. The judgment of the Court of Common Pleas that the order of the Ohio Civil Commission is not supported by substantial evidence is incorrect.

2. Said judgment is contrary to law.

Neither error assigned is well taken for the reasons hereinafter set forth. There is no question but that respondent had Linda Beeler removed from the trailer park for the reason that a black male visited her. As reprehensible as this conduct was, Linda Beeler's appeal must fail for several reasons. To hold otherwise would be to create bad law resulting from harsh facts. Again, we personally deplore respondent's action but hold that no claim may be made against him pursuant to the laws against discrimination of the State of Ohio. (Chapter 4112 of Ohio Revised Code).

O.R.C. 4112.02(G) states:

> "For any proprietor or his employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, national origin or ancestry, the full enjoyment of the accommodation, advantages, facilities, or privileges thereof."

It has neither been alleged nor proven by the appellant that complainant was denied accommodations because of her race, color, religion, national origin or ancestry. When discrimination is alleged against a person because of association with another person of a different ethnic group, it has been held that the discrimination was not actionable under Civil Rights statutes prohibiting discrimination against anyone on the basis of race, color, religion, national origin or ancestry. (*Matthews v. Hotz*, 191 Sup. App.T., 173 N.Y.S. 235).

In the 1969 Rhode Island case of *Buffi v. Perri*, where a white tenant was evicted because of her association with a Negro, the Court held that there was nothing in the act which prohibits indirect discrimination or makes it unlawful for a landlord to restrict his tenant's visitors to be a certain race or color. The Legislature could have included third person discriminatory practices, but it elected otherwise. (*Buffi v. Perri*, 106 R.I. 349, 259 A.2d 847 (1969)). The same holds true for the instant case; it would have been possible for the Ohio Legislature to have added the necessary terms to encompass third person associations but they did not.

The appellant has not only failed to allege and prove that complainant was discriminated against because of *her* race, color, etc. but has also failed to prove by reliable, probative and substantive evidence that a trailer park is

included as a place of public accommodations under Section 4112.02(G) of the Revised Code. Discrimination in Ohio is not unlawful per se. It only becomes unlawful when it manifests itself in an act that is specifically declared illegal by the Legislature.

In deciding that retail clothing stores did not come within the definition of "other places of public accommodation", the Ohio Court of Appeals stated:

> ". . . it is clearly established as a rule of construction that if, after enumerating certain places of business on which a duty is imposed or for which a license is required, the same statute there employs some general term to embrace other cases, no other case will be included in the general term except those of the same general character or kind as those specifically enumerated. (*Harvey, Inc. v. Sissle*, 53 O.A. 405, SN. E.2d 410, 1936).

A place of public accommodation was subsequently defined by Section 4112.01(1) of the Revised Code as follows:

> "Place of Public Accommodation means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, or any other place where the accommodation, advantages, facilities, or privileges thereof are available to the public."

As can be noted, the Legislature did enlarge the scope of the statute by specific terms to include retail stores. However, there is still no mention of trailer parks or similar establishments in the statute. Even if this provision did include a trailer park, there is ample evidence to show that its occupants are other than transitory.

The decision of the Common Pleas Court that the findings of the Ohio Civil Rights Commission were not supported by reliable, substantial or probative evidence should be upheld because:

1. The appellant neither alleged nor proved that Linda Beeler was discriminated against as provided by Section 4112.02(G), Ohio Revised Code.

2. The respondent is not in the class encompassed by Section 4112.02(G), Revised Code, as a place of "Public Accommodation"; if the respondent was in violation of any statute, it is Section 4112.02(H), refusing and withholding of housing accommodation, which has not been charged and time has since run to so charge.

APPENDIX C

Memorandum of Portage County Court of Common Pleas

(August 15, 1972)

Case No. 41580

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, PORTAGE COUNTY, SS.

OSTEP (REX) LYSYJ, d.b.a. KENT TRAILER PARK,
Plaintiff,

vs.

LINDA BEELER,
THE OHIO CIVIL RIGHTS COMMISSION,
Defendant.

MEMORANDUM

The order of the Civil Rights Commission made and entered on the 5th of October, 1971, is set aside, the same not being supported by reliable, probative and substantial evidence on the record.

Counsel will furnish appropriate Journal Entry-Order.

DATED at Ravenna, Ohio, this 15th day of August, 1972.

/s/ EDWIN W. JONES
Common Pleas Judge

APPENDIX D

Order of Ohio Civil Rights Commission

(October 5, 1971)

Case No. 215

STATE OF OHIO, CIVIL RIGHTS COMMISSION

In the Matter of

OSTEP (REX) LYSYJ, d.b.a. KENT TRAILER PARK,

FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER

I. PRELIMINARY STATEMENT

This matter comes on upon the sworn charge affidavit of Linda Beeler, complainant herein, filed February 27, 1970; Complaint and Notice of Hearing No. 215, issued December 2, 1970; respondent's Answer filed March 29, 1971; Amended Complaint and Notice of Hearing, issued April 7, 1971; the stenographic record of public hearing held on April 8, 1971, before Ovid Lewis, Esquire, a duly appointed hearing examiner of the Commission, and all exhibits therein; Attorney General's brief, filed June 9, 1971; the hearing examiner's written Opinion, Findings of Fact, Conclusions of Law and Recommendations, filed July 23, 1971; and the respondent's written Objections thereto, filed August 11, 1971.

The facts in this matter are as follows. The complainant is a Caucasian girl and is a student at Kent State University. She suffers from an allergic condition which is

aggravated by dust and aerosols, and which has made it advisable that she live away from other people. In September, 1969, she and her parents decided that she would live in a trailer during her remaining time at school. At the time this was approximately two years. No trailer was to be purchased, however, until a suitable location had been secured.

Miss Beeler approached Ostep Lysyj, respondent herein, and owner of the Kent Trailer Park, and arranged for a trailer lot. In late September, Miss Beeler's father bought an 18-foot travel-type house trailer at a cost of approximately $3,000.00, and it was installed on the lot.

Miss Beeler lived at the Kent Trailer Park from the time her trailer was installed until about December 20th, when she removed it after having been ordered to do so by Mr. Lysyj on December 12th.

During the period of her residency and thereafter, Mr. Lysyj had, on several occasions, stated to Miss Beeler and others that he didn't want "niggers" and hippies in his trailer park and had indicated his repugnance for "inter-romancing" between blacks and whites.

Prior to December 12, Miss Beeler had entertained Caucasians in her trailer several times but had had no black visitors. The record contains no indication that she was anything but a desirable tenant and it appears that she complied with all published rules of the park.

On December 12, at about 3:00 P. M., Miss Beeler met two friends, one of whom is black, and invited them to her trailer. A very few minutes later, while they were preparing tea, Mr. Lysyj appeared and ordered Miss Beeler to take her trailer and leave the park before the following January 1st.

Attempts were made by several persons, including her father and members of the Kent State University staff, to

urge Mr. Lysyj to change his mind and permit her to remain. These attempts were unsuccessful, and Mr. Lysyj charged that Miss Beeler had broken his (unwritten) "rule" against "inter-romancing." Although the respondent made no statement on the public hearing, the record presents several statements attributed to him at various times regarding other reasons for his eviction of Miss Beeler. They are (1) that he wished to place a larger trailer on the lot occupied by Miss Beeler, (2) that he didn't like her hippie friends, and (3) that she had started an argument with a friend of his at a camera store owned by him on the trailer park premises.

Regarding the trailer and lot size, the record reveals that the lot upon which Miss Beeler's trailer stood would accommodate a larger trailer. However, she paid the same fee for the lot that she would have paid with a larger trailer and, further, at the time Miss Beeler was evicted it was known to Mr. Lysyj that a lot of suitable size was available.

Concerning the appearance and character of her friends, it appears that Mr. Lysyj had several conversations with Miss Beeler in which he indicated that his prejudices were not limited to race or color. However, she was accepted as a tenant by Mr. Lysyj after she initially appeared on a motorcycle driven by a young man dressed in blue jeans and wearing long hair and a beard. The alleged argument appeared to be nothing more than a difference of opinion on war expressed between Miss Beeler and a camera supply salesman in Mr. Lysyj's store.

Mr. Lysyj's eviction of Miss Beeler constituted malicious, wanton, and reckless disregard of complainant's rights; and proximately caused detriment to Miss Beeler. She was required to move the trailer in late December, 1969, and effect a thorough search for space in other trailer

parks in and around Kent. Being unable to find such space, Miss Beeler and her parents stored the trailer, purchased four months earlier at a cost in excess of $3,000.00, at the complainant's home located forty miles from Kent.

As a further result of Mr. Lysyj's act, complainant lost the anticipated benefits of using the trailer as a dwelling during her remaining two years at Kent State University, which intention was also known to Mr. Lysyj. Complainant was required to take up residence in a crowded rooming house with other students. Such residence had an adverse and aggravating effect on her pre-existing physical (allergic) condition. Miss Beeler continued to live at the rooming house through the time of hearing.

As a further result of Mr. Lysyj's act, complainant's trailer, which was determined to have a life span of eight to ten years, depreciated at a rate of 10% ($300.00) per year, which depreciation was determined by use of the least costly, accepted method of depreciation. Various installation costs were incurred, including $25.00 for propane installation, $80.30 for materials and installation charge, which expenditures benefitted complainant little during her three-month tenancy at respondent's trailer park. Finally, the complainant was emotionally upset by Mr. Lysyj's intentional act, from which she suffered considerable humiliation and embarrassment.

On the basis of the above facts, the hearing examiner found the respondent in violation of Revised Code Section 4112.02(G), and recommended that the respondent be required to respond in compensatory and punitive damages. The Commission agrees.

The complainant in this matter alleged a violation of Revised Code Section 4112.02(G), which establishes that it is an unlawful discriminatory practice for the proprietor

of a place of public accommodation to deny the facilities, etc., thereof to any person except for reasons applicable alike to all persons regardless of race, color, religion, national origin or ancestry. On the morning of the hearing, prior to its commencement, an Amended Complaint setting forth the same facts and additionally alleging that they constituted a violation of provisions of the Ohio Fair Housing Law was served on the respondent. This Amended Complaint was rejected by the hearing examiner. Because, for the reasons set forth in the hearing examiner's Report, the Commission finds that the original complaint is sufficient for the full consideration of the matters herein, and because therefore the Amended Complaint is superfluous, it is unnecessary to reach any question related to the sufficiency of the Amended Complaint, or to the time of its issuance and manner of service, or to the possible application of the Ohio Fair Housing Law to trailer park cases. The Commission, therefore, accepts no finding of the hearing examiner regarding such matters, and makes no ruling or finding related to them.

With regard to punitive damages, the respondent urges that he has sold the trailer park during the pendency of this matter and that any damages assessed as a deterrent to future violations on his part would be inappropriate. Although respondent submitted no evidence relative to the present ownership of the trailer park, the Commission believes that even if the trailer park were transferred to an innocent, bona fide purchaser, the assessment of such damages is necessary not only because of the willful and malicious nature of the respondent's acts, but as a deterrent to others beside the respondent, and is required for the accomplishment or the purposes of the Ohio Laws against Discrimination.

Except as set forth above, the Commission finds that the hearing examiner's Opinion, Findings of Fact, Conclusions of Law and Recommendations are fully supported by the record and adopts the same as its own; and incorporates the applicable portions of the Opinion as if fully rewritten herein.

Now, therefore, after consideration of the entire record and all the premises herein, the Commission makes the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. On December 12, 1969, respondent Ostep (Rex) Lysyj was the owner of the Kent Trailer Park, Kent, Ohio.
2. On December 12, respondent evicted Linda Beeler, complainant, from Kent Trailer Park for reasons not applicable alike to all persons regardless of race, color, religion, national origin or ancestry.
3. That respondent's act constituted wanton, willful, malicious, and reckless disregard of complainant's rights to use and enjoy her accommodations free from unlawful discrimination.
4. That as a result of said eviction, the complainant and her parents suffered loss by reason of the depreciation of her trailer in the amount of $150.00 and, further, the complainant suffered humiliation and physical and emotional distress.

III. CONCLUSIONS OF LAW

1. That respondent's Kent Trailer Park is a place of public accommodation as defined by Ohio Revised Code Section 4112.02(I).

2. That respondent's actions as set forth herein were in violation of Ohio Revised Code Section 4112.02(G), which states as follows:

> "(It shall be an unlawful discriminatory practice) . . . For any proprietor or his employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, national origin, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof."

IV. ORDER

1. It is ORDERED that respondent Ostep (Rex) Lysyj pay to the complainant Linda Beeler the sum of One Hundred and Fifty Dollars ($150.00) damages to compensate for the depreciation of her trailer.

2. It is further ORDERED that the respondent pay the complainant the sum of One Thousand Dollars ($1,000.00) as punitive damages based upon the respondent's intentional and malicious act of unlawful discrimination.

3. It is further ORDERED that the respondent pay to complainant the sum of One Thousand Dollars ($1,000.00) as punitive damages based upon the respondent's intentional and malicious act of unlawful discrimination.

THIS ORDER ISSUED BY THE OHIO CIVIL RIGHTS COMMISSION THIS 5TH DAY OF OCTOBER, 1971.

(Signatures of Members Omitted)

DEC 13 1
MICHAEL RODAK, JR

Supreme Court of the United States

October Term, 1974
No. 74-493

OHIO CIVIL RIGHTS COMMISSION,
Petitioner,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Reasons for Denying the Writ 2

1. The Decision by the Supreme Court of Ohio Is Not State Action Which Violates the Equal Protection Clause of the Fourteenth Amendment and Is Not a Retreat from the State of Ohio's Past and Current Laws Concerning Unlawful Discrimination and Is Not a Dilution of the Commission's Remedial Powers 2
2. The Decision of the Supreme Court of Ohio Is Not State Action Which Violates the Due Process Clause of the Fourteenth Amendment, and Does Not Foreclose Relief to Victims of the Discriminatory Practices Prohibited by the Ohio Laws Against Discrimination 5
3. Victims of Racial Discrimination in Public Accommodations Have a Right to a Remedy That Includes Compensatory and Punitive Damages 9

Conclusion 10

TABLE OF AUTHORITIES

Cases

Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948) 7
Boddie v. Connecticut, 401 U.S. 371 (1971) 8
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 4
Cincinnati Northern Traction Co. v. Rosnagle, 84 Ohio St. 310, 95 N.E. 884 (1911) 7
Ernsteins v. State Div. of Human Rights, 35 App. Div. 2d 599, 313 N.Y.S.2d 856 (1970), 40 A.L.R.3d 1290 anno. Civil Rights Section 3(b) at 1304-5 8
Evans v. Newton, 382 U.S. 296 (1966) 4
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 3
Grunau v. Faflik (App.), 50 Ohio Law Abs. 142, 77 N.E.2d 719 (1947) 7
Helvering v. Griffiths, 63 S. Ct. 636, 318 U.S. 371, 87 L. Ed. 843 (1943) 4
Hoffstetter v. Harris, 23 Ohio N.P. (n.s.) 579, *aff'd by Ct. of Appeals* (1921) 7
Hunter v. Erickson, 393 U.S. 385 (1969) 4
Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) 9
Levitt & Sons, Inc. v. Division Against Discrimination, 363 U.S. 418, 4 L. Ed. 2d 1515, 80 S. Ct. 1257 (1960) 3
Morgan v. B.F. Goodrich Co., 23 Ohio Law Abs. 541 mco March 24, 1937 7
Ortwein v. Schwab, 410 U.S. 656 (1973) 8, 9
Peters v. Hobby, App. D.C., 76 S. Ct. 790, 349 U.S. 331, 99 L. Ed. 1129 (1955) 4-5
Reitman v. Mulkey, 387 U.S. 369 (1967) 4
Rescue Army v. Municipal Court, Cal., 67 S. Ct. 1409, 331 U.S. 541, 91 L. Ed. 1666 (1947) 5

Rose Co., M.J., v. Lowery, 33 Ohio App. 488, 169 N.E. 716 (1929) 7

State Div. of Human Rights v. Lupino, 35 App. Div. 2d 107, 313 N.Y.S.2d 28 (1970) 8

Thrope v. Housing Authority of City of Durham, N.C., 89 S. Ct. 518, 393 U.S. 268, 21 L. Ed. 2d 474 (1969) 5

Weiner v. Cuyahoga Community College District, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) 3

Constitution and Statutes

Constitution of the United States, Fourteenth Amendment 2, 4, 5

Ohio Revised Code:

Chapter 4112 ..... 2, 3, 5, 6, 7, 8, 10
Section 2901.35 8
Section 4112.01 6
Section 4112.02(G) 2, 3, 9
Section 4112.02(H) 6
Section 4112.05(G) 2, 3, 4
Section 4112.08 7
Section 4112.051 5

42 U.S.C. 2000 (e) (2) 3

Supreme Court of the United States

October Term, 1974
No. 74-493

OHIO CIVIL RIGHTS COMMISSION,
Petitioner,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Ostep (Rex) Lysyj, dba Kent Trailer Park, respectfully prays that the petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio entered in this case on June 12, 1974 and the petition for rehearing denied on July 31, 1974 be denied.

REASONS FOR DENYING THE WRIT

1. THE DECISION BY THE SUPREME COURT OF OHIO IS NOT STATE ACTION WHICH VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND IS NOT A RETREAT FROM THE STATE OF OHIO'S PAST AND CURRENT LAWS CONCERNING UNLAWFUL DISCRIMINATION AND IS NOT A DILUTION OF THE COMMISSION'S REMEDIAL POWERS.

The Ohio Legislature has provided one means of dealing with discrimination by enacting a comprehensive set of Laws concerning various types of discriminatory practices. These laws constitute chapter 4112 of the Ohio Revised Code. The Ohio Laws Against Discrimination are not, however, an exclusive remedy. Alternative forms of remedial relief are available and will be discussed in a later section.

The Supreme Court of Ohio determined that there was unlawful discrimination present in the instant case, and concurred in the opinion that the remedy provided by the General Assembly in R.C. Section 4112.05 (G), for the violation of this one particular statute R.C. Section 4112.02 (G) was the issuance of a cease and desist order, Petitioner's Appendix "A". Since the State of Ohio has in fact provided a remedy in Section 4112.05 (G) and since there are avenues of recovery available to petitioners, through the courts, there is a lack of any substantial federal question to be decided by the Court. If a plaintiff can place himself within the purview of the proper state agency or tribunal to obtain redress of his grievances and he has not utilized these state remedies, then there

is a lack of a substantial federal question. *Levitt & Sons, Inc. v. Division Against Discrimination*, 363 U.S. 418, 4 L. Ed. 2d 1515, 80 S. Ct. 1257 (1960).[1]

Petitioner cites *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) which is a decision on fair employment practices. Chapter 4112 of the Revised Code provides the remedies mentioned in the above decision. Section 4112.02 (G) ". . . (Remedies) including, but not limited to hiring, reinstatement, or upgrading of employees with, or without back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance." The Ohio Laws against discrimination have allowed for back pay and other affirmative relief in fair employment cases through a specific grant of authority by the General Assembly to the Ohio Civil Rights Commission. There is no conflict between federal fair employment practice decisions and Ohio law. However, the instant case does not involve fair employment practices.

The decision of the Supreme Court of Ohio construing Section 4112.02 (G) is not inconsistent with *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970). In *Weiner* the Court held that when general contractors bid on a project jointly funded by the State and Federal Government it is permissible, in accord with 42 U.S.C. 2000 (e) (2), to require the bidders to provide an affirmative action plan for the employment of minorities. The Supreme Court of Ohio has not retreated from that position by its finding that Section 4112.05 (G) provides solely for a cease and desist order in Public Accommodation cases.

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1. An appeal from a judgment of the Supreme Court of New Jersey (31 N.J. 514, 158 A.2d 177) was dismissed per curiam without opinion for want of a substantial federal question (Black, J., dissenting).

The decision of the Supreme Court of Ohio is not violative of the Fourteenth Amendment to the United States Constitution as set forth in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Evans v. Newton,* 382 U.S. 296 (1966); *Hunter v. Erickson,* 393 U.S. 385 (1969); and *Reitman v. Mulkey,* 387 U.S. 369 (1967). The decision involves the state in preventing and eliminating discrimination by use of cease and desist orders, Section 4112.05 (G), and other alternative remedies through the courts of proper jurisdiction.[2]

The Supreme Court of Ohio was not willing to imply a board grant of power to an administrative agency,[3] but in a footnote the Court stated, "Indeed, a question which we need not now decide is whether, by statute, such a power can be lodged in other than a judicial tribunal." The Supreme Court of Ohio acted in accord with the long held principle that Constitutional questions should not be determined abstractly or in a hypothetical case, or anticipated in advance of the necessity for determination or in advance of enactment. *Helvering v. Griffiths,* 63 S. Ct. 636, 318 U.S. 371, 87 L. Ed. 843 (1943); *Peters*

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2. The Supreme Court of Ohio stated in its opinion that "the Power to award damages to a person suffering loss as a result of the unlawful action of another has traditionally been limited to judicial proceedings."

3. Petitioner's Appendix A "We find nothing in R.C. 4112.05 (G) which indicates that the General Assembly attempted to authorize appellant to award either compensatory or punitive damages. The authority included in the statute to award "back pay" refers to a specific and limited type of remedy to be used in fair employment cases. It does not constitute a board grant of power. The authority to take 'affirmative action' may well include extensive powers to effectuate the purpose of the Civil Rights Acts, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act. See, e.g. R.C. 4112.051 (E)."

v. Hobby, App. D.C., 76 S. Ct. 790, 349 U.S. 331, 99 L. Ed. 1129 (1955); *Rescue Army v. Municipal Court, Cal.,* 67 S. Ct. 1409, 331 U.S. 541, 91 L. Ed. 1666 (1947); *Thrope v. Housing Authority of City of Durham, N.C.,* 89 S. Ct. 518, 393 U.S. 268, 21 L. Ed. 2d 474 (1969).

The ability of a state administrative agency to award damages, if so authorized by the legislature, has not been decided by the Supreme Court of Ohio. Since there has been no determination of this question the appeal by the Commission is not yet ripe and calls for a premature ruling on a contingent constitutional question.

2. THE DECISION OF THE SUPREME COURT OF OHIO IS NOT STATE ACTION WHICH VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND DOES NOT FORECLOSE RELIEF TO VICTIMS OF THE DISCRIMINATORY PRACTICES PROHIBITED BY THE OHIO LAWS AGAINST DISCRIMINATION.

The Ohio Civil Rights Commission represents one forum available to victims of the discriminatory practices prohibited by Chapter 4112 of the Ohio Revised Code. It is not a monopoly on the relief available and unlike some state statutes is not an exclusive remedy.

Section 4112.051 R.C. provides for the commencement of actions in the Court of Common Pleas.

> "Section 4112.051 Actions in a Common Pleas Court.
>
> (A) The rights granted by division (H) of Section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of Common Pleas * * * A civil action

shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred."

Section (H) 4112.02 provides in part that it shall be an unlawful discriminatory practice:

"For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, or national origin, of any prospective owner, occupant, or user of such housing:"

"Housing accommodations" are defined by Section 4112.01 of the Revised Code.

"(J) Housing Accommodations includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease."

Clearly Respondent's trailer park constituted a "housing accommodation" as well as a "public accommodation". This is evidenced by the fact that the Civil Rights Commission attempted to amend its complaint the day before the initial hearing, to include violations of Section 4112.02 (H) (1) and (4). The hearing examiner dismissed the amended complaint because it was untimely. (R. pp. 25-26) The petitioner did in fact have an alternative avenue for redress through Chapter 4112 R.C.

Petitioner, in addition to the remedies provided in Chapter 4112 R.C. could have availed itself of the normal

judicial procedure with a civil law suit. The tort of intentional infliction of emotional distress is recognized in Ohio. *Cincinnati Northern Traction Co. v. Rosnagle*, 84 Ohio St. 310, 95 N.E. 884 (1911); *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948); *Morgan v. B.F. Goodrich Co.*, 23 Ohio Law Abs. 541 mco March 24, 1937. A Plaintiff has a right to damages merely for humiliation, *M.J. Rose Co. v. Lowery*, 33 Ohio App. 488, 169 N.E. 716 (1929). If there is a wrongful eviction, a lessee may also recover all damages sustained by reason of the wrongful eviction, caused by the lessor, in addition to the value of the unexpired term of the lease. *Hoffstetter v. Harris*, 23 Ohio N.P. (n.s.) 579, *aff'd by Ct. of Appeals* (1921); *Grunau v. Faflik* (App.), 50 Ohio Law Abs. 142, 77 N.E.2d 719 (1947). Since Section 4112.08 expressly states that the procedures and remedies in chapter 4112 are *not* exclusive, petitioner had the option of filing suit in Common Pleas Court for wrongful eviction, intentional infliction of emotional distress and humiliation.[4] The petitioner made the election of remedies, but the decision was voluntary and not forced upon either the original plaintiff or the Civil Rights Commission.

The New York State Courts have determined that the State Division of Human Rights has no authority in administrative proceedings to order payment of damages for mental anguish and pain and suffering arising out of racial discrimination. The Court said that if the persons discriminated against had chosen the alternative procedure of bringing civil action in Court, they could have recovered all damages that they could establish. The agency could award compensatory "out of pocket damages" because it

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4. Section 4112.08 provides in part "Nothing contained in Sections 4112.01 to 4112.08 and Section 4112.99 of the Revised Code, shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, national origin, or ancestry."

was specifically granted this power by the legislature. Therefore, to allow the administrative agency to award for other than the specific "out of pocket expenses" would render meaningless the statutory alternative of permitting a person to seek relief in Court. When the election to seek the administrative remedy was made that remedy is controlled by the statutes. *State Div. of Human Rights v. Lupino,* 35 App. Div. 2d 107, 313 N.Y.S.2d 28 (1970); *Ernsteins v. State Div. of Human Rights,* 35 App. Div. 2d 599, 313 N.Y.S.2d 856 (1970), 40 A.L.R.3d 1290 anno. Civil Rights Section 3(b) at 1304-5. In the instant case when petitioner elected the administrative remedy it became bound by the provisions of Chapter 4112 for establishing that remedy. The Ohio Supreme Court has determined that the remedy in this case, by statute is a cease and desist order. Persons in Ohio, as in New York, can elect to file a civil action to receive monetary awards. In addition, at the time of the commencement of this action by the Civil Rights Commission in December of 1970, R.C. Section 2901.35 was in effect. R.C. Section 2901.35 prohibited public accommodations discrimination and provided for damages. While it is true that this section was repealed, effective January 1, 1974 it was available to the petitioner in this case with regard to the respondent.

In *Boddie v. Connecticut,* 401 U.S. 371 (1971) the Court established the legal standards for due process and the principle that a party's opportunity to be heard must not be foreclosed. Applying the three part test introduced in *Ortwein v. Schwab,* 410 U.S. 656 (1973) for determining a violation of the due process clause it is apparent that there is no violation. In *Ortwein* the applicability, to indigents, of a $25.00 filing fee for docketing cases with the supreme court was upheld under the theory that there were alternative means of relief available through the Administrative Welfare Agency. The test used by the Court

in rendering its decision was: (1) the interest involved must be of a fundamental nature, (2) those interests must be significantly affected by the statute, as construed, and (3) alternative methods to obtain the relief sought must not be available. Even if the first two parts of the test are satisfied the fact that there are alternative means available to aggrieved persons in Ohio will cause the alleged violation to fail. As in *Ortwein* the Court should uphold R.C. Section 4112.02 (G) as construed by the Supreme Court of Ohio.

3. VICTIMS OF RACIAL DISCRIMINATION IN PUBLIC ACCOMMODATIONS HAVE A RIGHT TO A REMEDY THAT INCLUDES COMPENSATORY AND PUNITIVE DAMAGES.

In Ohio the right to compensatory and punitive damages is recognized and available to aggrieved persons (*supra*). In *Jackson v. Concord Co.*, 54 N.J. 113, 125-28, 253 A.2d 793, 800-01 (1969), the New Jersey court was applying a civil rights statute[5] that was an exclusive remedy. And in such a case it may well be that compensatory and punitive damages must be awarded by a state agency, however, R.C. Section 4112.02 (G) is not an exclusive remedy. The remainder of Petitioner's cases deal either with a judicial application of statutes, as opposed to administrative agencies or with fair employment practices. A judicial application of a state statute may foreclose an individual's right to be heard if there are no alternative means of obtaining relief, but this is not

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5. N.J.S.A. 10:5-27 ". . . as to practices and acts declared unlawful by section eleven of this act [N.J.S.A. 10:5-12], the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, Civil or Criminal, based on the same grievances of the individual concerned."

the problem under consideration. As stated previously the Fair Employment Practice Statutes in Chapter 4112 R.C. comply with federal standards (*supra*).

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Ohio be denied.

Respectfully submitted,

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